No. 16204

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

National Labor Relations Board,

Petitioner,

vs.

Paint, Varnish & Lacquer Makers Union, Local 1232, AFL-CIO, and Steel, Paperhouse, Chemical Drivers & Helpers, Local 578, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America,

Respondents.

REPLY BRIEF FOR RESPONDENTS.

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Statement of the Case.

Andrew Brown Company is a California corporation which operates a plant in Los Angeles, California, where it is engaged in the manufacturing, sale and distribution of paint and allied products. Said firm will be herein referred to as the "Company". The Paint, Varnish & Lacquer Makers Union, Local 1232 and Steel, Paperhouse, Chemical Drivers and Helpers, Local 578 are labor organizations and will be herein referred to as "Unions".

The Unions commenced picketing of the Company on *July 29, 1955.* [Tr. p. 19.] The pickets carry placards addressed to the public stating that the Employer's pro-

ducts were nonunion and were on the "We do not patronize" list of the two Unions. The signs bore the names of both Unions. The picket signs and oral appeals of the pickets were directed to the public and to employees of suppliers or customers of the Employer rather than to the Employer's employees. There was some evidence that on *July 29 and August 1, 1955,* the Union had requested recognition of the Company. [Tr. p. 20.]

On *November 16, 1955,* the Company filed a representation petition in Case No. 21-RM-379. On the *same day* the Unions by letter disclaimed any interest in representing the Company's employees. [Tr. p. 49; Resp. Ex. 5, 6.] The Company received Exhibit "5" on November 18, 1955, made photostats of it and sent it to other competitors in the industry. [Tr. p. 91.] The Company's salesmen were given photostatic copies of Exhibit "5" and used them in connection with meetings with customers. [Tr. p. 92.] The original of Exhibit "5" was photographed and blown up into a big fair sized poster, of the approximate size of 2½′ wide and 5′ high, and was posted at conspicuous places in the plant where employees could see it. [Tr. pp. 93, 94.] Exhibit "6" was also received by the Company in the due course of mail. [Tr. pp. 94, 95.]

The representation hearing was held on January 6, 1956 and ultimately the Board found that "the current picketing is not solely for the purpose of organizing the employees, but is tantamount to a present demand for recognition of both Unions by the Employer without regard to their majority status." *115 N.L.R.B. No. 132* (Mar. 21, 1956). The wide publicizing of the disclaimer letters, Exhibits "5" & "6" to employees, competition and customers alike, was not mentioned in this decision. An election was directed in appropriate units for each of the

Unions. On *April 10, 1956,* the election was held and neither union received a majority of the votes. When the unions continued picketing, complaints were issued alleging that Section 8(b)(1)(A) of the Act had been violated. The placard of the pickets sign reads as follows:

To the Public

The products manufactured by this firm

Andrew Brown Company

"Brolite"

are

Non-Union

This product is on the "We do not patronize list" of Teamsters Joint Council No. 42, Los Angeles District Council of Painters, Los Angeles Building Trades Council, Los Angeles Central Labor Council. [Tr. pp. 22, 23.]

At the hearing in Case No. 21-CB-830, no testimony was offered. The Unions stipulated that picketing was being carried on and that they did not represent a majority of the employees. On the question of the objective of the picketing, the trial examiner, over the Unions' objection, took official notice of the Board's finding in the prior representation hearing (115 N.L.R.B. No. 132) that the Unions were demanding recognition from the Company despite their lack of majority status. [Tr. pp. 26, 27.] It is noteworthy that the Trial Examiners *did not* take official notice of the underlying evidence in the representation case which gave rise to the finding of fact. The Trial Examiner in his intermediate report found a Section 8(b)(1)(A) violation and this was affirmed by the Board.

I.

The Conduct of the Unions Is Not Violative of the Act.

As stated by the General Counsel, this case presents a question of statutory interpretation which was left open by this Court in *N.L.R.B. v. I.A.M. Lodge 942,* decided February 4, 1959, No. 15, 814 viz, whether Section 8(b)(1)(A) of the Act prohibits picketing to compel an employer to recognize a minority union. A full statement of the reasons supporting the Unions position is contained in the Machinists answering brief in No. 15, 814 to which this Court is respectfully referred.

This Court's attention is also respectfully directed to the District of Columbia's decision in *Drivers Local 639 v. N.L.R.B.,* 43 L.R.R.M. 2156 wherein similar conduct was held not violative of the Act. On *April 20, 1959,* the United States Supreme Court granted certiorari in this decision.

II.

The Taking of Official Notice of the Board's Findings of Fact and Conclusions of Law in 115 N.L.R.B. No. 132 Was Error and Deprived the Unions of Due Process.

It is clear that aside from the basic question which is presently before the United States Supreme Court, the General Counsel's case falls for want of proof of an unlawful objective if the Trial Examiner was without legal authority to make a fact finding of a recognitional objective *solely* upon the basis of the Board's finding contained in the representation case decision. It is equally clear that the Trial Examiner took official notice *only* of the ultimate finding of fact to-wit: that the Unions picketing had as its objective the acquiring of recognition

rights. Conversely, the Trial Examiner did not take notice of the *evidence* upon which the findings were based. The examiner made it clear that he considered the ultimate finding in the RM case as substantial evidence in and of itself to support a determination of unlawful objective.

In his Intermediate Report he adhered to these rulings and explains that he had accepted the representation case decision "as prima facie evidence of the facts found therein, as contended by the General Counsel, that he may proceed to take official notice of such fact, and that the decision *constitutes substantial evidence in this proceeding of the facts therein found.*" [Tr. p. 26.]

Objection was made at the hearing that Respondents had no way of controverting by evidence the *fact finding* and *conclusions* of *the Board itself, as distinct from the evidence received by the Board upon which such findings were based.* How, for example, could the Trial Examiner weigh oral testimony of witnesses against a finding made by an administrative body, least of all, of an administrative body which in this very proceeding would act as the reviewer of the Trial Examiner's "resolution" of difference between testimony heard by him and a prior decision of his agency? How, indeed, could the Board itself weigh Respondents' testimony against a bare prior determination of its own in the absence *of the evidence* upon which such prior findings rested. Accordingly, the suggestion that the Board's decision was received as subject to rebuttal evidence was and is completely illusory. In truth and in fact, the prior findings and conclusion of the Board in the RM case were treated as *res judicata* upon the Respondents with respect to the *only controverted fact issue in the case.*

The Trial Examiner must have been troubled by this aspect of his ruling because in his Intermediate Report he stated:

> "More particularly, Respondents are specifically protected under §9(d) of the Act which provides that wherever any Board finding of unfair labor practices and ensuing order 'is based in whole or in part upon facts certified following an investigation pursuant to sub-section (c) of this section and there is a petition for the enforcement or review of such order, *such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under §10(e) or 10(f),* and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.'" (Emphasis added.) [Tr. p. 28.]

This amazing rationale overlooks two fundamental considerations underlying section 9(d):

(1) *"Facts certified* following an investigation" mean the Board's certification that a union does or does not represent a majority in an appropriate bargaining unit. These "certified facts" are not by any means the various specific fact findings which appear in a Board's decision. In deed, the true certified facts may result from a consent election agreement quite as appropriately as from a hearing.

(2) More importantly, the Respondents defending an unfair labor practice complaint, are not "protected" in any respect by being permitted to see the transcript of the representation case evidence only if they carry the case to the United States Court of Appeals.

> Presumably, the Board itself is not to be permitted in this proceeding to examine the evidentiary basis, if any, upon which the ultimate fact findings, contained in its prior decision, were based. The record below is clear that Counsel for the General Counsel offered and the Trial Examiner received only the bare RM case decision itself and the formal certification documents which followed it.

The unfairness of such a procedure becomes even more patent when it is recalled that representation proceedings are specifically excepted from the protection of a trial, evidence, findings, appellate procedure and expert adjudication as provided in the Administrative Procedure Act with respect to administrative proceedings which have for their purpose the imposition of sanctions upon respondents. The rules of evidence of the Federal District Courts are not applicable to the representation proceedings as they are to the unfair labor practice proceedings. In successfully resisting direct court review of representation proceedings, the Board has constantly taken the position, and secured court approval thereof, that representation proceedings are non-adversary activities of a peculiar investigational character.

Madden v. Brotherhood of Transit Employees, 147 F. 2d 439;

N.L.R.B. v. Falk Corp., 308 U. S. 453;

A.F.L. v. N.L.R.B., 308 U. S. 401;

Fitzgerald v. Douds, 167 F. 2d 714

None of the cases cited by the Trial Examiners involved the use of a representation case decision, alone, as proof of an essential element of an unfair labor practice. An examination of *N.L.R.B. v. Townsend,* 185 F. 2d 378 (9th Circuit) cert. denied, 341 U. S. 909, relied

upn by both the Counsel for the General Counsel and the trial Examiner, shows that the court did not approve but, in fact, questioned the Board's use of official knowledge of fact findings contained in the prior representation proceedings. The use of this type of evidence was sustained only because the Respondent had failed to preserve his objection thereto under Section 10(e) of the Act. As this court stated:

> ". . . the respondent did not avail himself of a twenty day period . . . to object to receipt in evidence of the prior decision by *the questionable procedure of taking judicial notice thereof or to the finding of basic fact rested thereon.*" (Emphasis added.)

The Intermediate Report demonstrates just how illusory was the right accorded the Unions to offer evidence rebutting the Board's finding. The Intermediate Report erroneously states that Respondents "did not seek to rebut these findings." [Tr. p. 18.] The Unions did offer countervailing evidence. Their difficulty is that the Trial Examiner simply failed to allude to this evidence in his Intermediate Report, underscoring the fact that he, in fact, treated the Board's RM case decision as *res judicata.* (See Unions' Exhibits 1 through 6 inclusive, and the stipulation of facts showing that Unions' Exhibit 5, the Paint Makers disclaimer letter, was, prior to the RM case hearing, enlarged, and widely publicized by the Company to all of its employees, its customers and its salesmen. [Tr. pp. 64-68.] It may be granted that the Trial Examiner or anyone else might have difficulty in assessing the weight of the Unions' evidence against the bare findings of the Board, but their relevance seems obvious. In its RM case decision, the Board appears to say that the

disclaimer letter should not be taken at face value because the union continued its picketing. The language of the Board is quite obscure on this point. In one place the Board says the picketing is *"tantamount* to a present demand for recognition"; in another place the Board says with respect to the disclaimer letters that they are "ineffectual to remove the question concerning representation herein." In this setting, who can say whether the Board would have reached the same conclusion had it known that the Company had posted enlarged copies of the disclaimer letter in locations throughout the plant for employees to read, and had widely circulated the letter through its salesmen to its customers. We have not been given the benefit of the transcript of the Board proceeding but it seems rather doubtful that the Company officials would have testified as to this conduct since it was at complete variance with the position taken by the company in the representation proceeding, viz., that the unions' disclaimer letter did not mean what it said. If it be assumed that the Board regarded the picketing as a contradiction of the disclaimer letter, this contradiction would seem to disappear when it is learned that the Company, its employees, and its customers all regarded the letter as a true statement of the Unions' position even while it continued its picketing. It may be noted at this point that such publicizing conduct on the part of the Company completely negatives any coercion or restraint of employees, arising from so-called recognitional picketing. How can employees believe that their Section 7 right to refrain from union activity is sought to be abridged by a union which their employer assures them is not even seeking to act as their exclusive bargaining representative? Specific exception was made to the failure of the Trial Examiner to make any finding whatsoever upon this im-

portant conduct of the Company and its obvious effect upon the minds of the employees. Not only does this evidence negative any violation of Section 8(b)(1)(A) but it is the strongest kind of countervailing evidence in rebuttal of the Board's RM case decision, which goes to the very heart of the question as to whether the picketing, after dispatch of the letter, had, for its purpose, even in part, the aim of exclusive recognition.

Viewed in another light, the posting and publicizing to employees of the disclaimer letter must be regarded as more effectual than the posting of a board notice under Section 8(b)(1) as recommended by the Trial Examiner and the Board. After all, if employees are informed in a letter bearing the signature of a union official and on the union stationery, that the union does not seek to act as their exclusive bargaining representative, and if such letter bears the implied approval of the employer, what purpose is served by the holding of a Labor Board election. There is no question of the power of the Labor Board to order an election if it so desires, and the union has no way of appealing from such action of the Board, in forcing it into an unwanted and premature election. But it is quite another thing for such a proceeding to be used as irrebuttable proof of an unfair labor practice. The election papers received into evidence indicate that neither union had any observers at the election nor did they otherwise participate in it, consistent with their position that they were being forced into a premature election. [G. C. Exs. 5-8.] It is also noteworthy that the Paint Makers Union, whose letter had been posted by the Company, received only eleven votes in the election, whereas the Teamsters Union lost the election through a tie vote. [G. C. Exs. 7-8.] It will be recalled that the Company saw fit to post only the Paint Makers disclaimer letter

despite the fact that the Board, in effect, managed to impute a recognition request to the Teamsters Local only because its representative accompanied a Paint Maker representative on the occasion when the latter allegedly asked for recognition. Had the Company posted the Teamsters disclaimer letter, it, no doubt, would have received only a minimal vote in its favor in the election.

All of the foregoing shows to what limits the General Counsel is going in this proceeding to try to prevent peaceable organizational picketing. No facts such as these appear in the *Drivers Local 639 v. N.L.R.B.* (*supra*) which was relied upon heavily by the Board prior to its reversal in the DC Circuit. Furthermore, these facts point up the strange shyness of Counsel for the General Counsel when he was asked on the record to explain what relationship the representation election had to his theory of a violation of Section 8(b)(1). He declined to state why it was necessary to allege that an election had been lost after Respondents had stipulated that neither of them had ever represented a majority of the employees. On his theory of the case, the holding of an election should be of no consequence so long as it is established that the Unions never did represent a majority. It seems to the undersigned that the representation proceeding was injected in this case simply and solely for the purpose of attempting to avoid the effect of the disclaimer letters, and in an effort to give some colorable basis for a claim that organizational picketing was in effect recognitional picketing. This case lays bare the strategy being followed by employers with the aid of the General Counsel of the Board to attempt to prevent all organizational picketing as a violation of the Act. The strategy runs as follows:

(1) A union engages in non-recognitional peaceable picketing;

(2) The employer files an RM petition;

(3) The union, to protect itself from a premature election, sends a disclaimer letter to the employer;

(4) A representation hearing is held at which the employer testifies that expressly or impliedly some union official asked him for some kind of recognition;

(5) The Board, under its present policies, directs an election, primarily because the union is still picketing. In so doing, it does not feel called upon to find an express continuing demand for recognition, but only to find equivocal conduct on the part of the union;

(6) The union loses the election, which everyone realized from the beginning the union did not want or seek;

(7) If it continues to picket, the employer files a charge to protect his employees' rights to refrain from unionization;

(8) A "CB" case hearing is held at which it is impossible for the union to make any defense because, upon the employer's and the General Counsel's theory, all of the relative fact issues have already been determined in the representation proceeding. The union is given the illusory right to complain that no election should have been held and to offer evidence of some unspecified kind to show that it had effectively retracted any claim for recognition that it might have made;

(9) The evidence of the union is received but it cannot be credited because the Trial Examiner cannot contradict the implied finding contained in the Board's representation case decision, even though an alleged recognition demand might have occurred many months or years prior to the disclaimer letter and the Board representation hearing;

(10) By the above process, any union which at any time has expressly or impliedly been charged by an em-

ployer with making a pre-election demand for recognition is not at liberty to engage in any organizational picketing. Its disclaimer will be treated as a subterfuge. Its affirmative desire for no election will be disregarded. It will be forced into a premature election and then found guilty of unfair labor practices on the basis of the representation proceeding itself. In this entire process no employee has been coerced or restrained in any respect. As in the present case, the employees may be entirely unaware of all of this high strategy conduct of the employer designed to remove pickets from his plant in his own self-interest, by masquerading as the protector of their right not to join a union even though the union has done nothing that in fact has interfered in the least degree with the exercise of that right.

This elaborate venture designed to protect employers and weaken unions in the exercise of traditional rights heretofore deemed either protected, or at the very least permissible, is further buttressed by the most elaborate re-examination and re-interpretation of the legislative history of the Act and the re-canvassing of a large number of prior Board decisions—all because it is necessary, if the venture is to succeed, to convince the Board that some colorable legal basis can be found, without amendment of the Act, to stop simple organizational picketing. Aside from all of the legalisms which may be brought to bear on the subject, it must strike the Board as strange that these hidden possibilities for the extension of Section 8(b)(1)(A) into an "unlawful purpose" section, have just come to light.

In this vein, it might be well for this Court to consider the policing by it of the 8(b)(1)(A) orders granted by the Board in this case. If this Court should affirm the Board order, and the union complied with this order by

posting the notice for 60 days both in its office and at the Company plant, the question will then arise as to whether the union has the right to engage in organizational but non-recognitional picketing after the posting period has elapsed. The General Counsel contends that such minority picketing is only unlawful to the extent that it is engaged in for the purpose of compelling recognition. However, the unions' disclaimer letters are terated as ineffective to convert recognitional picketing to non-recognitional picketing.

Query: Will the General Counsel take the same attitude with respect to non-recognitional picketing after the posting period following a Board order? We surmise that he will for the simple and obvious reason that the employer's charge in cases of this kind is designed to get rid of the pickets and is in no sense a genuine desire on his part to protect statutory rights of his employees. This being so, he must, and he will, insist that organizational picketing, *per se,* must be stopped for all time at his plant after an 8(b)(1)(A) order.

We know that employers who have been found guilty of violating Section 8(a)(1) have not lost their right to oppose unionization of their employees by *lawful* means, such as addressing protected remarks to captive audiences, "prophesying" rather than "threatening" a plant shutdown if the union should be successful in its drive, and a score of other strategems calculated to prevent unionization but not technically violative of the Act. In fact, they enjoy all of these rights even while their initial unfair labor practice remains unremedied. Should this Court find that recognitional picketing by a minority union coerces and restrains employees within the meaning of Section 8(b)(1)(A), is it prepared to rule that the unions may thereafter engage in lawful non-recognitional picket-

ing designed to obtain majority support? The rationale urged by the Counsel goes a long way in the direction of saying that once a union has made the mistake of asking for recognition, and backed this demand up with picketing, its right to engage in organizational picketing is thereafter gone. Thereafter, any picketing by such a union will apparently be regarded as tainted with the original sin, which we suggest this Court consider before it arrives at any decision on the pending cases posing the 8(b)(1)(A) coverage in cases such as this one. We believe that if this Court will take a long look at the procedures and strategies being followed in cases of this kind, that it will not lend its weight to the employer's attempt to use the Board to prevent organizational picketing. If such picketing, as a matter of public policy, should be curtailed, regulated or stopped, the subject is one for Congress and not for the Board or the judiciary.

III.

The Six-Months Statute of Limitation Bars the Present Case.

The cut-off date under the six months statute of limitation for the Teamsters charge is April 11, 1956, and under the Paint Makers charge is March 3, 1956. The unions did nothing shown in the record during the respective six months periods except to conduct picketing. No demand for recognition was shown in the evidence later than August 1, 1955,—and this demand was only evidenced by the Board's RM case finding, that demands were made on the latter date. This was eight to nine months before the cut-off date under the charge. The disclaimer letters were written in November, 1955, four or five months prior to the cut-off dates. The Board representation hearings were held three to four months

before the cut-off dates. The Board decision was handed down, and the election held, after the Paint Maker cut-off date but prior to the Teamsters cut-off date. It can scarcely be urged the Board's decision and the election and the certification of the results thereof have any bearing upon the unfair labor practices charged. The complaint says that the unions have been continuously picketing for recognition at all times since July 29, 1955, and that neither union has represented a majority at any time since that date. From the foregoing it appears that if any violation occurred, it was complete upon July 29, 1955, more than a year before any charges were filed. There is no reason to consider such a violation, as charged, any more "continuing violation" for statute of limitation purposes, than there is to consider the existence and functioning of a Company dominated union to be a continuing violation after the last act of domination on the part of the Company. Like the picketing, the Company union persists and functions and, presumably, has not lost its Company dominated character any more or any less than illegal purpose picketing has lost its original character. The Board has held that it will not entertain a charge of Company unionism based upon evidence of actual acts of domination or assistance occurring more than six months before the filing of the charge. This is true even though the Company union continues to represent employees and give effect to union shop contracts.

Bricklayers A.F.L. & Selby Battersby & Co., 117 N.L.R.B. No. 51;

Universal Oil Products Company & Oil Workers International Union, 108 N.L.R.B. No. 19;

American Radio Association, 117 N.L.R.B. No. 151;

Superior Engraving Co. v. N.L.R.B., 183 F. 2d 783, and cases cited therein.

It may be true that events beyond the six months period may be used to "shed light" on events occurring within the six months period, as noted by the Trial Examiner, but there still must be evidence of overt conduct of an illegal character within the six months period. It is inaccurate to speak of the pre-six month conduct as "background" or as showing the "purpose and character" of conduct. The only overt evidence of any recognitional demand arises from conduct prior to the six month period. This is an *essential critical* part of the Board's case, *i.e.*, the *sole* proof of unlawful objective and is therefore barred by the statute of limitation. If the rule were otherwise, then the six months statutory period would be meaningless.

It is submitted that the Board having failed to establish by substantial evidence on the entire record that Respondents engaged in conduct having an objective violative of Section 8(b)(1)(A) or any other section of the Act, the order of the Board's petition for enforcement should be dismissed.

Respectfully submitted,

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